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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

BLACK DIAMOND STEAMSHIP CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on September 8, 1965.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1a–15a, *infra*) is reported at 351 F. 2d 387. The opinion of the district court (App. B, pp. 16a–32a, *infra*) is reported at 233 F. Supp. 373.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1965 (App. A, pp. 1a–15a, *infra*). By an order entered on December 9, 1965, the Chief

Justice extended the time in which to file a petition for a writ of certiorari to and including January 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the two-year statute of limitations contained in the Suits in Admiralty Act began to run on respondent's suit against the United States to recover alleged overpayments of charter hire only when a "final audit" of respondent's accounts had occurred, even though, several years previously, the charter had terminated, the alleged overpayments had been made, and the United States had, by Regulation, reaffirmed its intention to retain the alleged overpayments.

2. Whether, in calculating the "additional charter hire" due on excess "cumulative net voyage profits" at the end of each calendar year under Section 709(a) of the Merchant Marine Act of 1936, the charterer may average profits over the term of the charter rather than account for them on a yearly basis.[1]

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[1] This Court's decision in *Massachusetts Trustees v. United States*, 377 U.S. 235, 250–251, forecloses any contention by respondent that it may average its profits over the *entire* term of the charter; the Court approved the "Foreign Trade Addendum" under which profits earned before September 1, 1947, can in no event be averaged with profits earned after that date. Respondent now contends that it may average its profits and losses in the periods before and after September 1, 1947.

STATUTES INVOLVED

Section 5 of the Suits in Admiralty Act, as amended, 41 Stat. 526, 46 U.S.C. 745, provides, in pertinent part:

> Suits as authorized by this chapter may be brought only within two years after the cause of action arises * * *.

Section 709(a) of the Merchant Marine Act of 1936, as amended, 49 Stat. 2010, 46 U.S.C. 1199(a), provides, in pertinent part:

> Every charter * * * shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits * * * shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay * * *, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided,* That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

STATEMENT

From September 26, 1946, until August 13, 1949, the respondent, Black Diamond Steamship Corporation, chartered ships from the United States Maritime Commission[2] under a standard charter contract for government-owned vessels. These charters were

[2] The Maritime Commission was abolished by 1950 Reorganization Plan No. 21, effective May 24, 1950, 15 Fed. Reg. 3178, 64 Stat. 1273, and its functions transferred to the Maritime Administration, under the Department of Commerce.

made pursuant to a ship-charter program undertaken under Section 5 of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1738). See *Massachusetts Trustees* v. *United States*, 377 U.S. 235. Clause 12 of the standard contract required Black Diamond to pay, as "basic charter hire," a fixed monthly sum for each vessel chartered. In addition, Clause 13, pursuant to Section 709(a) of the Merchant Marine Act of 1936 (46 U.S.C. 1199(a)), required the payment of "additional charter hire" "whenever, at the end of any calendar year * * * the cumulative net voyage profits [of the charterer] * * * shall exceed 10 percentum per annum on the charterer's capital * * *." Periodic "preliminary" payments of this additional charter hire were required by Clause 13 (App. A, *infra*, p. 2a). Such payments were to be:

> * * * subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

Under the terms of the charter, Black Diamond paid the Maritime Commission $4,154,469 as basic charter hire, and also made preliminary payments of additional hire totalling $943,050 (App. A, *infra*, p. 9a). Black Diamond redelivered the last of the vessels it had chartered on August 13, 1949. The preliminary payments of additional charter hire made by Black Diamond covered profitable operations during 1946 and 1947. The last such payment

was made on June 25, 1948. Since Black Diamond suffered losses in 1948 and 1949, no preliminary payments of additional charter hire were made for those years.

On February 21, 1950, the Maritime Commission issued a Regulation governing the procedure to be followed by all charterers in the rendition of "final accountings" of operations under the charters.[3] Among the provisions in the Regulation was one expressly forbidding the general combining of profits and losses in different calender years for purposes of computing the additional hire owed. The present refund suit, filed in November, 1956, more than six years after the issuance of this Regulation, challenges the Regulation's interpretation of Section 709(a) of the Merchant Marine Act of 1936, and asserts the right to "cumulate" profits and losses over the life of the charter as the basis for finally calculating the additional hire due for the charter term.[4]

After the issuance of the Regulation now challenged, considerable correspondence took place between the Commission and Black Diamond regarding the submission of a "final accounting" of Black Diamond's operations under the charter (App. B, *infra*, pp. 20a–23a). Nowhere in the correspondence

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[3] 46 C.F.R. (Rev., 1953) 209.37-4(c)(2) (General Order 85, Supp. 21, published March 30, 1950 (15 Fed. Reg. 1789)).

[4] See footnote 1, *supra*. Hereinafter we refer to respondent's claim as an "averaging claim." The benefits of averaging, if permissible, are increased by the fact that additional charter hire was assessed on a "sliding scale" which increased the rate of additional hire as the amount of cumulative profits increased. The "sliding scale" was upheld in *Massachusetts Trustees* v. *United States*, 377 U.S. 235.

did respondent state or intimate that it objected to the Regulation forbidding it to average profits. On August 31, 1951, Black Diamond in fact submitted a document labeled a "final accounting" for all charter transactions recorded on its books up to June 30, 1951 (App. B, *infra*, p. 22a). This accounting revealed, as had numerous preliminary statements earlier submitted, that respondent profited in 1946 and 1947 and sustained losses in 1948 and 1949; it therefore revealed that Black Diamond would have a substantial claim for refund of charter-hire overpayments if averaging were to be permitted. Again, however, no claim was made challenging the Regulation prohibiting such averaging.

On August 9, 1955, Black Diamond submitted a further accounting, covering items related to the charter period and recorded on its books between July 1, 1951, and May 31, 1955.[7] In a letter accompanying this accounting, Black Diamond, for the first time, asserted its claim that losses in 1948 and 1949 could be used to offset profits in 1946 and 1947 in calculating additional charter hire. The letter stated that "the accounting submitted herewith differs from the one submitted on August 31, 1951" in that, *inter alia*, profits were calculated over the entire period of operations under the charter instead of on an annual basis; that is, contrary to the applicable Regulation, losses in later years were used to offset

[7] These additional items represented roughly one per cent of the total cash transactions arising from charter operations; in other words, as of August 31, 1951, when a "final accounting" was submitted, accounting was virtually complete.

earlier profits (App. A, *infra*, p. 8a). A voucher was enclosed, demanding a refund.

On the same day, August 9, 1955, Black Diamond filed a petition in the Court of Claims, seeking a refund in accordance with this claim. The petition was dismissed for want of jurisdiction on July 12, 1956, on the ground that the claim was cognizable only in an admiralty court. On November 23, 1956, more than eight years after the last preliminary payment of additional hire under the charter, more than seven years after redelivery of the last vessel chartered, more than six years after the issuance of the Regulation stating that yearly profits could not be averaged, and more than five years after the submission of its comprehensive "final accounting," Black Diamond filed its libel in the district court in the present case claiming a refund of additional hire on the ground that averaging should be permitted.

The government contended that the suit was barred by the two-year statute of limitations in the Suits in Admiralty Act (46 U.S.C. 745). The district court sustained this defense; any different result, it held, "would frustrate the purpose of the statute of limita-

[*] Initially, respondent also raised two other claims as bases for refund: (1) that additional charter hire had been improperly assessed on a sliding scale, rather than on a fixed percentage of profits, and (2) a claim arising out of the "Foreign Trade Addendum" issued by the Maritime Commission in September, 1947. These claims were rejected in *Massachusetts Trustees* v. *United States*, 377 U.S. 235.

[†] See *Archawski* v. *Hanon*, 350 U.S. 532; *Sword Line, Inc.* v. *United States*, 228 F. 2d 344 (C.A. 2), rehearing denied, 230 F. 2d 75, affirmed as to admiralty jurisdiction, 351 U.S. 976.

tions" (App. B, *infra*, p. 30a; 233 F. Supp. 373, 380). The court of appeals reversed. In its view, respondent's claim did not accrue until the time of "final audit," *i.e.*, a single, final accounting of every charter item. The court found that such a final audit occurred here no earlier than August 9, 1955, the date of the last accounting which had been submitted by respondent.[1] The case was remanded for determination of respondent's claims to refund through averaging, the substantive right to averaging having been previously sustained by the court in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (C.A. 4), certiorari denied, 372 U.S. 944.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals holding respondent's suit timely is in direct conflict with decisions of the Court of Appeals for the Second Circuit involving the identical issue. *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, certiorari denied, 368 U.S. 895; *American Eastern Corp.* v. *United States*, 133 F. Supp. 11 (S.D. N.Y.), affirmed *per curiam*, 231 F. 2d 664, certiorari denied, 351 U.S. 983. The same issue, moreover, is presented in almost a score of additional pending refund suits involving several million dollars in

[1] The accounting process, however, has not yet ended; there are still items recorded on Black Diamond's books which have not been accounted for or audited. The profit and loss figures referred to in the opinion below (App. A, *infra*, p. 9a) thus are still not "final," as that term is used by the court below. Under the logic of the decision below, the statute therefore has still not begun to run today, 16 years after redelivery of the last vessel.

alleged charter hire overpayments. We also submit that the decision below is erroneous both as an application of the statute of limitations and as an incorporation of the court's previous decision that respondent has a right to average yearly profits in computing the "additional charter hire" due.

1. In *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, certiorari denied, 368 U.S. 895, the Second Circuit, sitting *en banc*, considered the application of the statute of limitations to averaging claims relevantly identical to Black Diamond's. It held that "the right to recover overpayments came into existence at least at the time of the charterer's preliminary statements." Such claims were held barred unless "brought within two years of preliminary statement or final audit, *whichever was earlier*" (291 F. 2d at 608, 609, emphasis added). The court unequivocally rejected the charterer's contention that averaging claims could be postponed until two years after final audit. Under this decision, Black Diamond's claim accrued at the very latest on August 31, 1951, when it submitted an accounting which clearly constituted a comprehensive "preliminary statement."*

In the present case, the Court of Appeals for the Fourth Circuit adopted the rule rejected by the Second Circuit in *American Foreign Steamship Corp.* v. *United States*—*i.e.*, that the cause of action on such claims

* Black Diamond labelled this statement a "final accounting." In this litigation it has viewed it as a preliminary statement and the court of appeals found that it was not a "final audit" (App. *infra*, p. 10a).

cannot, in any event, arise until "final audit." [2] The court thus postponed the running of the statute of limitations for more than six years after the issuance of the Regulation stating that averaging would not be permitted in computing additional hire, and for more than five years after the submission of the comprehensive preliminary accounting which would have begun the limitations period under the Second Circuit's prior decision."

[2] The Second Circuit had the limitations issue before it in one case before *American Foreign*. In *American Eastern Corp. v. United States*, 133 F. Supp. 11 (S.D.N.Y.), the district court held that a cause of action by a charterer claiming the benefits of averaging profits and losses over the period of a charter arose no later than the date of issuance of the Regulation denying such averaging benefits in February, 1950. The district court, in addition, explicitly rejected the contention—adopted by the court of appeals here—that a suit could be maintained so long as instituted within two years of "final audit" (133 F. Supp. 11, 16–17). The court of appeals affirmed, *per curiam*, without opinion and this Court denied certiorari, 351 U.S. 983. Since it is clear from the district court's opinion in *American Eastern* that there was not a "final audit" in that case more than two years before the suit was instituted, *American Eastern*, like the *en banc* decision in *American Foreign*, is in direct conflict with the decision below.

The suggestion in the opinion below that *American Foreign* is "not contra" (App. A, *infra*, p. 13a) is difficult to understand. The comments of the court below concerning *American Foreign*, that the "distinguishing holding there was that liability for additional hire was to be ascertained on a yearly rather than on a charter-term basis" seem to be directed entirely to the concurring opinion in that case; Judge Smith's opinion of the court that the limitations period starts to run no later than the time of submission of the preliminary accounting statement is not based on the view that additional hire was to be ascertained on a yearly rather than on a charter-term basis. Moreover, the concurring judges rested their opinion not only on their view that additional charter was to be paid on an annual

The limitations issue in the present case determines the disposition of about $250,000, apart from interest. There are, in addition, presently pending in district courts in the Second, Third, Fifth and Ninth Circuits approximately 20 libels by approximately 15 charterers which contain averaging claims as to which the limitations issue has been raised under the rule adopted in the Second Circuit, but which would be timely under the decision below.[11] We estimate that these claims total between 2 and 3 million dollars. In addition, there has never been a "final audit" of the books of a number of charterers (within the meaning of that term as used by the court of appeals in this case) so that even more claims which would be time barred by the Second Circuit rule—but not by the rule in this case—may be brought in the future if the present decision stands. Resolution of the conflict is accordingly a matter of substantial importance.[12]

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basis, but, as their dissent in the earlier *en banc* decision indicated (265 F. 2d 136, 148, 149, reversed on ground that Senior Judge Medina was ineligible to sit, 363 U.S. 685), also on the ground that the court's earlier decision affirming the district court in *American Eastern Corp.* v. *United States*, *supra*, was correct. *American Eastern* is not in any respect based on the view that additional hire was payable on a yearly basis.

[11] In estimating the number of pending cases affected by the decision below, we have excluded cases in which the United States has claims exceeding those of the charterer, so that the charterer could submit the time-barred claims to set off claims by the United States. See *United States* v. *Atlantic S.S. Co.*, 359 U.S. 314.

[12] Of the 90 companies which chartered ships under contracts identical to the one involved here, approximately 70 have sued the government. There has never been an audit of the last

2. The decision below is plainly incorrect. In the district court's words (233 F. Supp. at 380, App. B, *infra*, p. 30a), it "frustrate[s] the purpose of the statute of limitations" by allowing an inordinate delay in the assertion of a claim justiciable many years before the suit was brought. No adequate explanation exists for the lengthy delay in the bringing of this suit; respondent cannot reasonably justify leaving several hundred thousand dollars in alleged overpayments with the Maritime Commission for more than seven years simply because there had not been a comprehensive "final audit" and it therefore did not know the *exact* amount of its claim down to the last dollar.

As the Second Circuit held, there is no reason why respondent should not have filed its libel within (at the latest) two years of the submission of its comprehensive accounting in August, 1951. The last vessel chartered from the government had been returned in August, 1949, and the last preliminary payment of additional charter hire had been made, more than one year before that, in June, 1948. In February, 1950, the Maritime Commission issued its

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entries on the books of many of the remaining 29 charterers, who seemingly are free to bring suit under the decision below, no matter how long ago they returned the ships.

In addition, the "final audit" provision which the court below held determinative is present, not only in charters, like that in this case, pursuant to the Merchant Ship Sales Act of 1946, but also in charter agreements pursuant to other government ship charter programs. See, *e.g.*, *United States* v. *Moore-McCormack Lines, Inc.*, 303 F. 2d 864, certiorari denied, 372 U.S. 944.

Regulation stating that averaging would not be permitted in the computation of additional charter hire." The comprehensive accounting of August, 1951, labelled a "final accounting," revealed that respondent had sustained losses from its charter operations in 1948 and 1949 after having engaged in profitable operations in 1946 and 1947. Since preliminary payments of charter hire had already been made by Black Diamond on the basis of its profitable years in 1946 and 1947, it was thus clear to respondent no later than August, 1951, that an averaging claim, if successful, would result in a substantial recovery of charter-hire payments. The cause of action therefore arose at least by that time and was barred when this action was brought in November, 1956.

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[14] "It is our position that the statute of limitations began to run on Black Diamond's claim no later than February, 1950, when this Regulation was issued. Such was the holding of *American Eastern Corp.* v. *United States*, *supra*. As pointed out in that decision (133 F. Supp. at 13–15), by August, 1949, when active charter operations ceased,

> "* * * all facts upon which [the charterer's] claim is based had occurred. Profits had been earned; losses incurred; preliminary payments had been paid. Thereafter it was merely a matter of computation to determine the amount of excess preliminary payments to which libelant was entitled.
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> * * * * * * *
>
> To the extent libelant claims for money had and received, its claim was mature when respondent, through the Maritime Commission's regulations for final accounting, unequivocally asserted its intent to withhold the money now claimed by libelant. * * *

If certiorari is granted, we will urge that *American Eastern* is the correct solution of the limitations issue. The Second Circuit's later decision in *American-Foreign Steamship Corp.* v.

The reasons stated by the court below in support of its contrary holding that the claim matured only upon "final audit" of every item relevant under the charter are unsound. It is true that the contract provides that "payments of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit." This provision, however, while designed to permit adjustments to the accounts after the preliminary payments were made, in no way negates the fact that Black Diamond had a fully matured claim for return of charter-hire overpayments, based upon its averaging contentions, well before the completion of the "final audit" of every item relating to the charter, although such a "final audit" would make precise the exact amount of the averaging claim. The accrual of a cause of action on such a claim does not await its complete liquidation. *United States* v. *Atlantic Mutual Ins. Co.*, 298 U.S. 483; see also *Pacific Atlantic S.S. Co.* v. *United States*, 120 F. Supp. 753 (D. Ore.)."

United States resolves the issue in a way somewhat more favorable to charterers than *American Eastern*, but it would also bar the claims here and in many other pending cases. We shall urge the *American-Foreign* rule alternatively. The rule adopted below in the present case seems, in all events, to be wholly unresponsive to the purposes of the statute of limitations.

The suggestion of the court below (App. A, *infra*, p. 11a) that an attempt by respondent to bring suit on the claim before a "final audit" covering all charter transactions "probably would have encountered a plea of prematureness" is wrong, and overlooks the fact that respondent's suit brought prior to "final audit" here (there has never been such an audit in this case), as well

Moreover, the court of appeals' holding that the assertion of large claims of this nature could await the complete termination of the accounting of every charter item is inconsistent with the contractual scheme, under which charterers were required to pay 90 per cent of the debt for charter hire as shown by the latest accounting as the charters progressed (see 46 C.F.R. 299.31). To allow charterers with large claims to await a "final audit" many years after the termination of the charter would make this procedure a futile exercise. The plain fact is that respondent slept on its rights, leaving a large amount with the Maritime Commission without protest for several years before instituting suit for its return. Consistently with the clear Congressional decree "that, in admiralty actions, even mildly stale claims are not to be brought" (*American-Foreign Steamship Corp.* v. *United States*, *supra*, 291 F. 2d at 603), the present suit should have been dismissed.

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as numerous suits by other charterers brought before total completion of the accounting and auditing process, have never been answered by such a plea. Moreover, a claim of "prematureness" by the government would have been without merit, for nothing in the charter (unlike some government contracts), statute, correspondence, or anywhere else, required charterers to wait until final audit before bringing suit to recover overpayments.

Also incorrect is the suggestion in the opinion below (App. A, *infra*, p. 4a) that the correspondence between the parties indicated that, until the time of "final audit," everything was "wholly tentative." As respects respondent's claim for overpayments based upon averaging claims, such a statement overlooks the fact that the Maritime Commission had issued a Regulation in February, 1950, stating that averaging of early profits with later losses would not be permitted.

3. On the merits, the court below remanded respondent's claim for trial in accordance with the court's earlier decision (*United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866) that averaging is permissible in computing "additional charter hire" under charter provisions drafted in accordance with Section 709(a) of the Merchant Marine Act of 1936 (46 U.S.C. 1199(a)). The United States sought review of that decision but certiorari was denied (372 U.S. 944).

In view of the denial of certiorari in the *Moore-McCormack* case and the continued lack of a conflict in court of appeals' decisions,[12] we would not ask the Court at this time to review the merits of respondent's averaging contentions if that were the only issue now presented for review. The issue does, however, involve large sums of money in numerous pending cases (see *supra*, p. 11) and, as we shall show, its resolution in *Moore-McCormack* seems plainly erroneous. Therefore, if the Court grants our petition for certiorari to resolve the conflict in court of appeals decisions regarding the application of the statute of limitations to averaging claims, we submit that it would also be appropriate to review the merits of such claims in order finally to settle this question.

[12] There was no conflict of court of appeals' decisions when certiorari was denied in *Moore-McCormack Lines*. Since that time, the Fourth Circuit's decision has been followed by the Court of Appeals for the Ninth Circuit (*American President Lines, Ltd.* v. *United States*, 338 F. 2d 962); there have been no other court of appeals' decisions.

In brief, our view of the merits is as follows:

Section 709(a) provides that "[e]very charter * * * shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits * * * shall exceed 10 per centum per annum * * * the charterer shall pay * * * as additional charter hire, one-half of such cumulative net voyage profits in excess of 10 per centum per annum * * *." Thus, liability arises upon cumulative profits present at the end of any calendar year. The statute has no provision diminishing such liability because of losses or lower profits incurred in later years. Nor did the charter agreement in this case purport thus to modify the plain terms of the statute. The charter requires "preliminary payments" of additional charter hire prior to the conclusion of the final audit of the cumulative net profits and it makes the United States liable for any overpayments made by the charterer before the completion of such a final audit. But the charter agreement plainly does not (and it could not consistently with the statute) make losses or lower profits in subsequent years the source of a right to a refund of payments properly made pursuant to Section 709(a) in respect of cumulative net profits in prior years.

The fact that Section 709(a) does not require or authorize averaging is further evident from the proviso to the statute which states that cumulative net profit accounted for after one calendar year of the charter "shall not be included in any calculation of

cumulative net profit in subsequent years." This proviso would be inconsistent with a system requiring averaging of yearly profits to determine additional charter hire; it makes sense and serves a useful function only if the additional charter hire due is deemed finally and unconditionally determined on the basis of each calendar year's profits.

Finally, the plain meaning of Section 709(a) is confirmed by the long-continuing administrative construction. The construction, which has always been held to preclude the consideration of losses in later years in determining the amounts of additional charter hire due for earlier profitable years, was spelled out in an opinion of the Assistant General Counsel of the Maritime Commission in 1941 and was made the basis of a formal Regulation in 1950 (46 C.F.R. (Rev., 1953) 299.37–4(c)(2), see Statement *supra*, p. 5) interpreting Section 709 for the purposes of the Merchant Ship Sales Act of 1946 which incorporated its provisions.[17]

[17] If the Court grants our petition on the statute of limitations question, and if our view of this question ultimately prevails, almost every averaging claim arising under charters entered pursuant to Section 5 of the Merchant Ship Sales Act of 1946 will be time barred. (We are aware of only one such charter presently in existence). In that event, therefore, the merit of the averaging claims would not be an important issue in regard to these charters. Section 709(a) of the Merchant Marine Act of 1936, however, requires a provision for "additional charter hire" based upon yearly cumulative voyage profits in other government ship charters. See *e.g.*, the charter involved in the *Moore-McCormack* case. The proper interpretation of Section 709(a) is therefore a question of continuing importance regardless of the disposition of the limitations issue here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1966.

APPENDIX A

United States Court of Appeals

for the Fourth Circuit

No. 9933

BLACK DIAMOND STEAMSHIP CORP., APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal From the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, Chief District Judge

Argued May 31, 1965. Decided September 8, 1965

Before HAYNSWORTH, Chief Judge, BRYAN, Circuit Judge, and HUTCHESON, District Judge

ALBERT V. BRYAN, Circuit Judge:

The two-year limitation of the Suits in Admiralty Act, 46 USC 741, 745, was applied by the District Court in a summary judgment to bar recapture by Black Diamond Steamship Corporation of additional charter hire paid the United States under a contract for the demise of several cargo vessels from 1946 to 1949. The payments were made in 1946 and 1947 and the libel for the recovery was filed in November 1956. In the undisputed circumstances, we conclude the cause of action did not accrue earlier than August 1955 and the suit was timely.

The ships were chartered by the United States Maritime Commission[1] (a successor to the War Shipping Administration) by contract MCc 41815, pursuant to the provisions of the Merchant Ship Sales Act of 1946, 50 USC App. 1735 et seq. By § 5(c) of the Ship Sales Act, 50 USC App. 1738(c), the provisions of § 709(a) of the Merchant Marine Act, 1936, 46 USC 1101, 1199(a), were incorporated into the former, the adopted terms reading in part:

> "(a) Every charter * * * shall provide that whenever, at the end of any calendar year * * * the cumulative net voyage profits * * * shall exceed 10 per centum per annum on the charterer's capital * * * the charterer shall pay * * * as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum * * *."

Clause 13 of the Black Diamond charters after prescribing a sliding scale for such additional hire, on the basis of excess profits, provides for "preliminary" statements and payments to the owner as follows:

> "* * * The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire * * * at such times and in such manner and amounts as may be required by the Owner; provided, however, that *such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner,* at which times such payments will be made to the Owner as such preliminary statements or *final audit*

[1] Throughout this opinion our references to "Commission" will include its successors and transferees of authority, including the Maritime Administration. See 46 USCA 1111, Historical Note.

may show to be due, or such overpayments refunded to the Charterer as may be required." [Accent added.]

The validity of the sliding scale of the additional hire was established in *Massachusetts Trustees* v. *United States*, 377 U.S. 235 (1964). Moreover, in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (4 Cir. 1962), cert. den. 372 U.S. 944, we declared the right of the charterer to cumulate and average the profits and losses incident to the chartered operations over the duration of the charter rather than on a yearly basis. Those decisions came down after the events of the present litigation, but they are retrospectively effectual here to establish the premises of Black Diamond's claim.

Black Diamond's claim is that during the charter period—September 1946 to August 1949—it was entitled to the benefits of averaging computations, and, therefore, to the return of such additional charter hire as had been paid, under the Commission's requirement, in excess of the amount due upon averaging the profits and losses over the charter term. The refund, the Government pleads, cannot be allowed because the claim was not seasonably asserted, in that it arose more than two years before the commencement of the suit in November 1956.

In our view the plea is refuted by the terms of the charter and the administrative actions of the Commission. These conclusively demonstrate that the "final audit" within the understanding of Clause 13 was not made before 1955. The interim accountings—from the inception of the charter until August 1955—are proved by their accompanying circumstances to have been provisional only.

The method of accounting required of charterers was first outlined by the Commission in General

Order 60, as amended by Supplement 8, issued October 29, 1946. It demanded preliminary payments every month, but declared that they should be "subject to adjustment upon completion of audit by the Commission covering the period involved, and neither the tender thereof by the charterer, nor its acceptance by the Commission, shall prejudice the right of either under the applicable bareboat charter agreement or otherwise".

Supplement 21 to General Order 60, promulgated February 21, 1950, was the next directive. It ordered each charterer to submit "a separate final accounting of additional charter hire * * * for each annual or overall accounting period" under a charter such as Black Diamond's here. Included also was a requirement that the charter remit to the Government any excess of accrued additional charter hire above the payments theretofore made on account, and, conversely, allowed the charterer to apply for the refund of any overpayment. The Supplement repeated the recognition that the preliminary payments and accompanying statements were wholly tentative.

In conference, Black Diamond advised the Commission it had prepared a final accounting as of June 30, 1950, but could not submit it within the requisite time since a large number of items were still outstanding and unsettled. On November 28, 1950 the Commission wrote Black Diamond acknowledging the difficulty. It suggested that this accounting be submitted with the reservation that it was subject to adjustment "as a result of (1) *subsequent decisions with respect to any items pending with the Maritime Administration* (2) subsequent adjustments in connection with unsettled claims and (3) *subsequent establishment of any liabilities which have not as yet arisen,* which would effect [sic] such accounting".

On December 13, 1950, in response to the Commission's letter of November 28, 1950, Black Diamond wrote the Commission referring to the conference and saying:

> "* * * We also said [at conference] we did not feel that we could submit [our accountings] to the Administration without first obtaining assurance from the Administration regarding supplementary accountings. *Our reason for this is that Supplement 21 to G.O. 60 provides that these accountings be labeled 'Final Accounting' although it must be evident that these accountings cannot be 'final'.* No provision is made * * * for the submission and consideration of supplementary accountings that because of the very nature of the business will have to be made in order that any accountings * * * can be considered 'final' * * *.
>
> "In the absence of instructions regarding the foregoing, we do not see our way clear to forwarding these so-called 'final accountings' to the Administration without first obtaining from the Administration, in writing, their assurance that supplementary accountings, such as referred to above, will be accepted and *that the Administration will reimburse us for any overpaid additional charter hire shown to be due to us by such supplementary accountings.*" [Accent added.]

On January 26, 1951, the Commission answered this letter of Black Diamond, in pertinent part as follows:

> "You [are] also advised that the certification required * * * in Supplement 21 to General Order 60 may be modified to indicate that the accounting covered thereby is subject to subsequent adjustment * * *.
>
> "The Administration realizes that certain adjustments may have to be made subsequent to the date of the final Accountings under Supple-

ment 21 to General Order 60, which will require the Charterer to revise its statements and submit supplementary Accountings, therefore, your Accountings should be submitted with the reservations suggested in our letter of November 28, 1950 as soon as possible."

The Government itself desired to be assured that the remittances of additional charter hire be not considered as a final settlement. To this end the Commission issued a memorandum, dated May 14, 1951, directed to all charterers, stating:

> "Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is *on account* of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise. * * *"

Apparently to avoid any misunderstanding whatsoever, Black Diamond wrote the Commission on June 15, 1951. The letter stated:

> "* * * we again refer you to our letter, dated December 13, 1950 * * *. In response thereto * * * [The Commission] did not give us the assurance we requested in the last paragraph of our letter, dated December 13, referred to above. [The request was for an assurance, as noted, supra, "that the [Commission] will reimburse us for any overpaid additional charter

hire shown to be due to us by such supplementary accountings".]

"If, * * * 'the Administration realises that certain adjustments may have to be made subsequent to the date of the final accountings * * *' we see no reason why the Administration should not comply with the request contained in the last paragraph of our letter, dated December 13, 1950.

"Furthermore, under such circumstances, we feel that the Accountings in question should not be labeled 'Final' nor should affidavit accompanying these Accountings state that they reflect a 'complete statement of the additional charter hire accrued to the U.S. Maritime Commission.'"

In August 1951 Black Diamond filed an accounting extending through June 30, 1951. Termed a "final accounting", it was audited by the Commission in February 1952 and report of the audit was sent to Black Diamond on September 22, 1952 with the Commission's approval. In its letter of transmittal the Commission said:

"The revised accountings are subject to further adjustment to take into account (a) *applicable items recorded subsequent to June 30, 1951,* * * * and (e) *any errors or omissions later developed.*

"If your payments on account of additional charter hire exceed the total amount accrued to the Administration as shown in the attached revised accountings, *you may submit a claim for refund* of the excess payments in the form of a Public Voucher as provided in Supplement 21, to General Order 60." [Accent added.]

From July 1, 1951, through March 1956 Black Diamond disbursed $199,535 in almost 150 transactions stemming from charter operations and paid under

charter requirements. During the same period it received in the same connection $257,843.

With a letter dated August 9, 1955, Black Diamond submitted a "final accounting under the Contract [the charters] covering the period September 1, 1946 through August 31, 1949". Referring to the previous accounting "prepared in accordance with Supplement 21 of General Order 60" reflecting entries recorded through June 30, 1951, it specially directed the attention of the Commission to the critical premises of the accounting, viz:

> "The accounting submitted herewith differs from the one submitted on August 21, 1951 in three important respects:
>
> (1) The computation of cumulative net voyage profit is based upon the *entire period of operations under the Contract,* in accordance with Section (5)(c) of the Ship Sales Act, 50 U.S.C. App. 1738(c) and Section 709 of the Merchant Marine Act, 1936, 46 U.S.C. 1199.
>
> (2) Additional Charter hire is calculated on the basis of one-half of the cumulative net voyage profit in excess of 10 percent per annum of capital necessarily employed, in accordance with the statutory authority set forth above.
>
> (3) This is submitted for 'final audit' within the meaning of Contract MCc 41815." [Accent added.]

This account was audited and a report thereof forwarded to Black Diamond on September 28, 1955.

Demand was made in Black Diamond's letter for overpayment of additional charter hire in the sum of $726,937.47. The sum now claimed—$247,315.67—is the amount of overpayment of additional charter hire when that obligation is figured alone on "the entire period of operations", that is the averaging of profits and losses over the span of the charters.

Net profits or losses over the charter years had been as follows:

1946	$ 215,218.81
1947	1,286,878.95
1948 (loss)	(788,582.64)
1949 (loss)	(45,606.40)
Total Profits	$ 667,908.72

During the first two years preliminary payments to the Commission from Black Diamond for additional charter hire amounted to $943,050.41; during the last two years, with no net profits, no such instalments were paid.

The demand of Black Diamond in its letter of August 9, 1955 was refused on the ground that the bases of computation contained in paragraphs (1) and (2)—cumulative profits calculated on the period of operations and disregard of the sliding-scale reckoning—were impermissible. Since then, as we have observed, the entire-period accounting has been upheld, *United States* v. *Moore-McCormack Lines, Inc.*, supra, 308 F. 2d 866, and the sliding-scale charges have been sustained, *Massachusetts Trustees* v. *United States*, supra, 377 U.S. 235.

To summarize, our opinion—that the limitation period did not commence prior to November 1954, two years before the suit—rests on our interpretation of charter Clause 13 as postponing the onset of that period until "final audit" and on the factual premises just recounted showing that no final audit was attempted or practicable before 1955. The charter clause points to the conditional status of the periodic payments. Non-finality was recognized, too, by the fact that after the requirement of monthly remittances by General Order 60, Supplement 8, in October 1946, no other accounting instruction was forthcoming until February 21, 1950—in G.O. 60,

Supplement 21—long after the expiration of all Black Diamond's charters. Thus, during the charter periods definitive directions were non-existent. Even the Supplement was amended afterwards on June 5, 1951. Moreover, as late as May 14, 1951, the Commission itself was insisting that the accounting then in progress was conditional, as witness its memorandum of that date advising that remittance checks should not carry a notation of a final settlement. Significantly, this fact was mentioned in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, 871 fn. 10, as pertinent to the limitation question.

True, in August 1951, Black Diamond filed a "final accounting". Obviously, however, it was not considered a final audit within the meaning of Clause 13 of the charters because on September 22, 1952 the Commission wrote the charterer that the accounting was subject to "any errors or omissions later developed" and adverted to the right of Black Diamond to submit a claim for refund of excess payments. Neither this reference, nor the letters that passed in 1950-51 between Black Diamond and the Commission can justifiably be read, as the Government would have us, to restrict the subsequent adjustments to subsequent debits and credits. But even if they do, they conclusively imply that the account was not ripe to be squared off. The abeyance from 1951 until, certainly, 1955 in the footing up of a substantially final tally is also evidenced by the not inconsiderable entries of expenditures of $190,535, and receipts of $257,843, by Black Diamond in the interval from the last accounting of June 30, 1951 until March 1956. The occurrence of items after August 9, 1955 can show that the final accounting had not then been reached, but surely it does not prove an earlier totting up of accounts.

At no stage did the Commission intimate that the account was closed. Indeed, indications were quite to the contrary. This attitude was altogether correct, for it was in conformity with Clause 13 assuring the charterer of his right to have "overpayments refunded".

With the account still open we see no reason why Black Diamond could not defer until "final audit" assertion of the cumulative averaging method of arriving at the correct total of the overpayments. The argument does not question the legality of the additional hire but only its application. Consequently the claim did not necessarily arise when the payments were made. *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, 603, 607 (2 Cir. 1961). There was no obligation to urge it sooner. Any attempt to do so would probably have encountered a plea of prematureness—that it was something to be taken care of on final audit.

The overpayments were made by Black Diamond because so directed by the Government. Unlike tax assessments, they were required pursuant to contract, and no statute governed the recovery procedure. Yet the Government now says that because Black Diamond complied without protesting on each occasion, the aggregated payments or possibly each separate payment, with accompanying accounting, must be taken as a final casting up of accounts and a final audit. We cannot agree; we implied as much in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (4 Cir. 1962), with Judge Haynsworth saying for the court, pp. 874 and 875:

> "The United States makes a further contention that Moore-McCormack is estopped to contest the claim for additional charter hire. This arises out of the fact that Moore-McCormack

has filed annual reports required by Maritime and in the form prescribed by Maritime, without asserting its present contention. Estoppel could hardly arise, however, out of its compliance with Maritime's reporting and accounting requirements, and the point was entirely academic until the results of the charter operations in all of the years was known. Moore-McCormack did make its position known in 1957 before final approval of its accounting for any year within the charter period.

* * * * *

"Certainly, acquiescence in Maritime's requirements of it ought not to foreclose the present contention that Maritime had improperly construed and applied the statute."

In truth, *United States* v. *Moore-McCormack Lines, Inc.* unsparingly requires definition of "final audit" as we now determine it. That case dealt with a charter phrased almost identically with Clause 13, a charter drawn, as is Black Diamond's, in accord with § 709(a) of the Merchant Marine Act of 1936, supra. The opinion noted, at p. 869:

"Final determination of all items entering into a calculation of net voyage profits must await the settlement and adjustment of many matters. While preliminary accountings were submitted in accordance with Clause 6(b) [corresponding with Clause 13] * * * final accounting for 1951 was not settled and approved * * * until November 7, 1958. The accounting for 1952 was approved on December 19, 1958 and the Company's final accounting for 1953 was not submitted to Maritime until February 17, 1959."

Thus, the account was open for seven years and recapture allowed notwithstanding. Instantly, the account is held current for nine years.

While *United States* v. *Moore-McCormack Lines, Inc.* did not decide an issue of limitations, it did decide that "final audit" could not come until after the rendition and payment of all preliminary statements. More importantly it recognized, at 671, fn. 10:

> "The final audit to which Clause 6(b) [Clause 13 presently] of the charter refers, may well be one final audit of all operations under the charter made after its expiration. * * *"

The Government argues that the word "each" preceding the phrase "final audit" in Clause 13 discloses an intent to consider every periodic settlement a final audit. This view is not consonant with the reading of it in *United States* v. *Moore-McCormack Lines, Inc.*, supra. We think there can be but one final audit. More than one was noticed in Clause 13 because it covered two types of charters with a final audit for each. The first was the earlier War Shipping Administration charter, known as Warshipdemiscont, and the other, the instant form issued by the Maritime Commission, designated Shipsalesdemise. See *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598 (2 Cir. 1961) dissenting opinion, p. 615, fn. 1.

Although cited in opposition to the view we take, the ultimate decision of *American-Foreign Steamship Corp.* v. *United States*, supra, 291 F. 2d 598 is actually not contra. The distinguishing holding there was that liability for additional hire was to be ascertained on a yearly rather than on a charter-term basis. The opinion was handed down before our differing conclusion in *United States* v. *Moore-McCormack Lines*, supra, 308 F. 2d 866. Moreover, it was directed, first, to the statutory limitation as applied to claims founded upon the illegality of the Commission's hire rates. That

proposition is not now before us, legality having been accorded the Commission's rates in *Massachusetts Trustees* v. *United States*, supra, 377 U.S. 235.

As to the claims based upon the computation of the hire, American-Foreign Steamship Corp., at pp. 607, 608, conceded that "final settlement of the bareboat, charter accounts had to be postponed far into the future" and to "put off for later determination the validity of the opposing views on the correct interpretation of the charters at least until either the charterer in preliminary statement, or owner in final audit set forth its claims". It predicated its finding, of the occurrence of the "final audit", on a yearly and not a charter-duration reckoning, and hence it measured the limitation from an event we have since held not governing. Consequently, the Second Circuit determination upon the limitation defense is not persuasive here.

The opinion in *American Eastern Corporation* v. *United States*, 133 F. Supp. 11 (D.C.S.D.N.Y. 1955) aff'd p.c. 231 F. 2d 664 (2 Cir. 1956), cert. den. 351 U.S. 983, does not traverse our view. Despite its forthright discussion, we think a two-way trade was in truth involved there. Besides, more than "a one-way account" exists here. Moreover, in that case two years had clearly run after what appears to have been a final audit.

Our conclusion does not allow agreement or understanding to enlarge the two-year limitation of the Suits in Admiralty Act. It is merely a determination of when that limitation begins to run.

Throughout consideration of the issue here, it must be remembered that Black Diamond is asking only for what is its own, and not to create a liability upon the Government. The latter, on the present record,

has been unjustly enriched. The delay, even if inordinate, has not injured the United States for it has been possessed of the money ever since the funds were claimed to be due.

As we think Black Diamond is not time-barred, we will return the case to the District Court for trial on the merits of its claim.

Reversed and remanded.

APPENDIX B

In the United States District Court
for the District of Maryland

Admiralty No. 3885

BLACK DIAMOND STEAMSHIP CORP., LIBELANT

v.

UNITED STATES OF AMERICA, RESPONDENT

UNITED STATES OF AMERICA, CROSS-LIBELANT

v.

BLACK DIAMOND STEAMSHIP CORP., CROSS-RESPONDENT

Filed: July 31, 1964

THOMSEN, Chief Judge

The libel of Black Diamond Steamship Corp. (Black Diamond) seeks to recover $726,937.47 paid as "additional charter hire" for the use of government vessels under Contract No. MCc-41815 during the period September 1946 to August 1949. The libel is founded on two claims: first, a "cumulation" claim, which asserts that such additional charter hire should be calculated on Black Diamond's net profits cumulated over the entire period of the contract; and second, a "sliding scale" claim, which asserts that additional charter hire due should be calculated at the rate of 50% of the profits and not at the higher rates imposed by the Maritime Commission.

The government's answer denies the validity of both claims and contends that both are time-barred. Its cross-libel asserts that Black Diamond is indebted to

it in the amount of $28,252.04, or, alternatively, on *quantum valebat*, for a much larger sum.

Both sides agree that there is no genuine issue of material fact, and each party has moved for summary judgment. Those motions originally presented five issues for decision by this court, but the parties are agreed that two recent opinions, one by the Fourth Circuit and one by the Supreme Court, have determined how three of those issues must be decided. Those issues are:

1. "Cumulation." Whether, in the computation of "additional charter hire", Black Diamond has the right to cumulate its profits and losses over the entire period of the contract, rather than treat each year as a separate accounting unit. In *United States* v. *Moore-McCormack Lines, Inc.*, 4 Cir., 308 F. 2d 866 (1962), cert. den. 372 U.S. 944 (1963), it was decided that the Maritime Commission erroneously interpreted sec. 709(a) of the Merchant Marine Act, 1936, 46 U.S.C.A. 1199(a), as prohibiting the averaging of profits and losses over the entire contract period. That decision establishes the right of Black Diamond to "cumulate" the profits and losses involved in this case, subject to (a) the provisions of the "Foreign Trade Addendum" (see II, below) and (b) the time-bar defense (see V. below).

II. "Foreign Trade Addendum." In *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, — U.S. —, (May 26, 1964), the Supreme Court held valid the so-called "Foreign Trade Addendum", which permits the government to require two separate cumulations, one before September 1, 1947, and one after September 1, 1947, as a result of a modification of the contract made in 1947.

III. "Sliding Scale." The same Supreme Court case held that the Maritime Commission had the power under sec. 5(b) of the Merchant Ship Sales Act of 1946 to impose and collect a sliding scale of additional charter hire, and that sec. 709(a) of the Merchant Marine Act, 1936, does not negate that authority. That means that the government had the right to collect from Black Diamond additional charter hire on the sliding scale called for by the contract, and disposes of Black Diamond's second claim, referred to in the first paragraph of this opinion.

Two issues remain:

IV. "Time-Bar." The government's time-bar defense to Black Diamond's "cumulation" claim is still open. The time-bar defense to the "sliding scale" claim has become moot.

V. "World Market Charter Rates." Also open is the government's cross-claim based on its claimed right to charge "World Market Charter" rates.

Facts—Time-Bar

1. Black Diamond operated ships under contract MCc-41815 from September 26, 1946 until August 13, 1949. Throughout that period, Black Diamond made regular payments of "basic charter hire". In addition, in accordance with Maritime Commission requirements, Black Diamond made "preliminary payments" of "additional charter hire".

2. Contract MCc-41815 contains, in clause 13, language required by sec. 709(a) of the Merchant Marine Act, 1936, which was quoted by the Fourth Circuit in Moore-McCormack, 308 F. 2d at 868 et seq.[1]

[1] "(a) Every charter made by the Secretary of Commerce pursuant to the provisions of sections 1191-1204 of this title shall provide that whenever, at the end of any calendar year

Clause 13 continued: "* * * The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire * * * at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

3. Operations in the years 1946 and 1947 were profitable; operations in 1948 and 1949 resulted in losses.

4. "Preliminary payments" of "additional charter hire" were made to the Maritime Commission in accordance with Supplement 8 to General Order 60, a regulation issued by the Commission on October 29, 1946. Neither this regulation nor Contract MCc-41815 dealt specifically with cumulation of profits and losses over the term of the charter.

5. Black Diamond's last preliminary statement was submitted to the government on April 24, 1950. Its

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subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Secretary, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

last preliminary payment of additional charter hire accompanied an earlier preliminary statement in June 1948. None of the preliminary statements were based upon Black Diamond's present "cumulative" theory, and none referred to a possible "cumulative claim".

6. The Maritime Commission did not publish any regulations governing the method of settling accounts until the issuance of Supplement 21 to General Order 60 on March 30, 1950.*

7. Accounting under Contract MCc-41815 and Maritime Commission regulations is highly complex; various questions were raised by Black Diamond and answered by the District Comptroller of the Maritime Commission during 1950 and 1951.

8. On November 28, 1950, the District Comptroller wrote Black Diamond as follows:

> "At a recent conference in your office you advised our Mr. T. Conroy that your final accounting pursuant to the provisions of Supplement 21 to General Order 60 has been prepared, however, before submitting such accounting to this office you desired information as to the handling of adjustments in connection with expendable equipment inventories, unsettled claims, and other liabilities applicable to the bareboat operations which may be recorded subsequent to the date of your final accounting.
>
> "As regards items of this nature, it is suggested that you submit the accounting required under General Order 60, Supplement 21, with the reservation that such accounting will be

*Supplement 21 was itself further amended on January 8, 1951 and June 8, 1951, but those amendments do not affect the point at issue here. Supplement 21 provided that operating losses could be carried forward from one period to another for purposes of cumulation, but not operating profits. Black Diamond did not challenge this regulation until 1955.

subject to adjustment if, and to the extent required as a result of (1) subsequent decisions with respect to any items pending with the Maritime Administration (2) subsequent adjustments in connection with unsettled claims and (3) subsequent establishment of any liabilities which have not as yet arisen, which would affect such accounting.

"The certification required in Part VI of the procedure prescribed in Supplement 21 to General Order 60 may be modified to indicate that the accounting covered thereby is subject to subsequent adjustment with respect to the aforesaid items."

9. On December 13, 1950, Black Diamond replied, referring to specific items that might require a supplementary accounting, and asked for instructions with respect thereto. None of the items referred to any possible "cumulation" claim.

10. On January 26, 1951, the District Comptroller replied to Black Diamond's letter, reiterating what he had said in his letter of November 28, 1950, and concluding:

"The Administration realizes that certain adjustments may have to be made subsequent to the date of the final accountings under Supplement 21 to General Order 60, which will require the Charterer to revise its statements and submit supplementary Accountings, therefore, your Accountings should be submitted with the reservation suggested in our letter of November 28, 1950 as soon as possible."

11. On May 14, 1951, the District Comptroller sent a form letter to all Bareboat Charterers, which read in part as follows:

"Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or

otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is *on account* of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise."

This is the letter referred to in footnote 10 to the *Moone-McCormack* opinion, 308 F. 2d at 871.

12. A letter from Black Diamond to the District Comptroller, dated June 15, 1951, inquired about the "types of expenses" which had been the subject of Black Diamond's December 13, 1950 letter, but still made no reference to any "cumulation" claim. No reply to the June 15, 1951 letter is in the record.

13. On August 31, 1951, Black Diamond submitted a "final accounting" running through July 1, 1951, which was audited by the Maritime Commission on February 27, 1952. Neither in that "final accounting" nor in any previous communication with the Maritime Commission did Black Diamond question the legality of the Commission's regulation referred to in Finding 6 above, or make any other contention similar to its "cumulation claim".

14. On September 22, 1952, the Chief, Division of Audits, Maritime Commission, wrote Black Diamond as follows:

"With respect to the subject accountings, you are advised that the reports dated February 27, 1952 (Copy No. 5 attached) have been approved,

and it has been determined that additional charter hire amounting to $1,376,239.88 has accrued to the Maritime Administration as a result of your operations under the subject bareboat charter agreements.

* * * * * *

"The revised accountings are subject to further adjustment to take into account (a) applicable items recorded subsequent to June 30, 1951, (b) adjustments, if any, with respect to claims expense totaling $15,615.41 for which amount an accrual has been provided, (c) any recoveries, through pending legal action, of expenses charged with respect to SS *Blue Jacket*, (d) the overages and shortages of expendable equipment, and (e) any errors or omissions later developed.

"If your payments on account of additional charter hire exceed the total amount accrued to the Administration as shown in the attached revised accountings, you may submit a claim for refund of the excess payments in the form of a Public Voucher as provided in Supplement 21, to General Order 60."

15. In order to calculate the *exact* amount due for additional charter hire, whether under a "cumulative" accounting, as approved in *Moore-McCormack*, or under the accounting method prescribed by the regulations and followed by Black Diamond in its 1951 accounting, it is necessary to know the final results of all operations during all years of the charter or charters. Between July 1, 1951 and February 15, 1956, Black Diamond paid out almost $200,000.00 in transactions relating to operations under Charter MCo-41815 and also received scores of payments relating to that contract. The record does not show what items may have been paid or received by Black Diamond since February 15, 1956. The last book

keeping adjustment made by the Maritime Commission with respect to Black Diamond's charter accounts by way of mutually agreed refunds and transfers of funds was effectuated on January 6, 1954.

16. On August 9, 1955, Black Diamond submitted accountings which included the results of all transactions relating to its Contract MCc-41815 through May 31, 1955, and for the first time calculated a sum due Black Diamond in accordance with its "cumulation" theory. The Maritime Administration refused the claim, and returned the account to Black Diamond, retaining, however, two copies of the accountings.

17. On September 28, 1955, the Maritime Administration audited Black Diamond's accountings of August 1955.

18. Black Diamond's libel herein was filed on November 23, 1956.

Discussion—Time-Bar

This suit was brought by Black Diamond under the Suits in Admiralty Act, 46 U.S.C.A. 741 et seq., which provides, in sec. 745, that suits may be brought thereunder "only within two years after the cause of action arises". The question therefore is, when did Black Diamond's cause of action arise.

Only one case in which that question was either decided or discussed in connection with a "cumulation" clause has been cited or found. That is *American Eastern Corp.* v. *United States*, S.D.N.Y., 133 F. Supp. 11 (1955), aff'd per curiam, 2 Cir., 231 F. 2d 664 (1956), cert. den. 351 U.S. 983. In that case Judge Walsh said: "To the extent that libelant claims under the charter, its claim had arisen by June 16,

1948, when it returned the last of its ships to respondent. At that point all facts upon which its claim is based had occurred. Profits had been earned; losses incurred; preliminary payments had been paid. Thereafter it was merely a matter of computation to determine the amount of excess preliminary payments to which libelant was entitled. Delay in computation on the hope that respondent will compute upon the basis libelant believes correct does not toll the statute. Cf. *Corporation of Royal Exch. Assur.* v. *United States*, 2 Cir., 75 F. 2d 478, 480; *United States* v. *Sligh*, 9 Cir., 24 F. 2d 636, 638, reversed on other grounds 1928, 277 U.S. 582, 48 S. Ct. 600, 72 L. Ed. 998.

"There was no open account between the parties as contended by libelant, wherein the claim arises with the last entry because previous entries are regarded as offsets to each other. Here there was no two-way trade but merely a one-way account for charter-hire with periodic payments. See *Spring* v. *Gray*, 1832, 6 Pet. 151, 164, 31 U.S. 151, 164, 8 L. Ed. 352. The complexity of the computation of these payments did not alter the nature of the account.

"No provision of the statute or charter required libelant to await the promulgation of regulations for final accounting before commencing its action. If it had in fact overpaid and was entitled to return payments under the charter no regulation of the Commission could bar the right and none was necessary to round it out. Neither was it necessary for libelant to await the outcome of claims presented through administrative channels. *Cohen, Goldman & Co.* v. *United States*, 1933, 77 Ct. Cl. 713, 730, certiorari denied 1933, 290 U.S. 681, 54 S. Ct. 119, 78 L. Ed. 587; *Moriarty, Inc.* v. *United States*, 1942, 97

Ct. Cl. 338, 339; *Withers v. United States*, 1930, 69 Ct. Cl. 584, 587.

"To the extent libelant claims for money had and received, its claim was mature when respondent, through the Maritime Commission's regulations for final accounting, unequivocally asserted its intent to withhold the money now claimed by libelant. These regulations were promulgated on February 21, 1950. The outline of procedure incorporated therein expressly stated that profits could not be offset by losses incurred in subsequent accounting periods. The language is as follows:

> "'In providing for the calculation of additional charter hire based on the *cumulative* net voyage profit of the Charterer, Clause 13 of Part II of Shipsales-demise 303 provides also that such *cumulative* net profit so accounted for shall not be included in the calculation of cumulative net profit in any subsequent year or period. Pursuant to these provisions of the bareboat charter agreements, *only* deficiencies in net voyage profits may be carried forward, and then only under the following conditions.' [Emphasis in original] 46 C.F.R. § 299.37-4(C)(2).

More than two years have run since the promulgation of this regulation." 133 F. Supp. at 14–15.

The time-bar point was not involved in the *Moore-McCormack* case, because that was an action by the government to collect additional charter hire. The Court held that Moore-McCormack was not estopped to raise the cumulation theory as a defense, but that is a different question from the question presented in this case.

There are a few cases in which the time-bar question was discussed and decided in connection with claims based on the "sliding scale" issue, and in con-

nection with other allegedly illegal exactions. The matter was very fully discussed in three separate opinions filed by judges of the Second Circuit who sat in *American Foreign Steamship Corp.* v. *United States,* 2 Cir., 291 F. 2d 598 (1961). See also *American President Lines, Ltd.* v. *United States,* D. Del., 162 F. Supp. 732, 739–742 (1958), aff'd 3 Cir., 265 F. 2d 552, 553 (1959); *Luckenbach S.S. Co.* v. *United States,* Ct. Cl., 292 F. 2d 913, 916–917 (1961); *Isthmian Steamship Co.* v. *United States,* S.D.N.Y., 191 F. Supp. 335, 337 (1957), aff'd per curiam, 2 Cir. 302 F. 2d 69 (1962); and *American Mail Line, Ltd.* v. *United States,* W.D. Wash., 213 F. Supp. 152 (1962). Some of the possible dates discussed in those cases are not applicable to the facts of this case, e.g., the date the contract was made, which might control a claim based upon the inclusion of an illegal clause in a contract, but has no application to a cumulation claim, which is a matter of accounting and depends upon the results of all operations during the entire period of the contract. *United States* v. *Moore-McCormack Lines,* supra. Cf. *American Foreign Steamship Co.* v. *United States,* supra.

In addition to the points decided in its favor in the *American Eastern Corp.* case, supra, the government relies on the provisions of clause 13 of the contract in support of its contention that the cause of action arose not later than February 27, 1952, when the government audited the "final accounting" submitted by Black Diamond on August 31, 1951. The pertinent parts of clause 13 quoted above in Finding 2, indicate that Black Diamond's right to refunds arose "at the time of the rendition of preliminary statements" by Black Diamond or "upon the completion of each final audit" by Maritime.

Black Diamond's last preliminary statement was submitted on April 24, 1950; its last payment of additional charter hire accompanied an earlier preliminary statement of June 1948. Black Diamond could have raised its "cumulation" claim at the time its last preliminary statement was submitted in April 1950, but it did not do so. Although that date might be considered the date on which a "sliding scale" claim or similar cause of action arose, see *American Foreign Steamship Corp.* v. *United States*, supra, it cannot properly be held the date on which the "cumulation" claim involved in this case arose, in view of the nature of the claim as described by the Fourth Circuit in *United States* v. *Moore-McCormack Lines*, where the Court said:

> "This interpretation of the statute would treat each annual report and each payment on account of additional charter hire as tentative, for what, if any, additional charter hire ultimately will be found to be due, cannot be determined until after expiration of the charter. Clause 6(b) of the charter, however, specifically provides that they are. Payments of additional charter hire are preliminary and subject to adjustment until the rendition of a preliminary statement or the completion of a final audit, at which time the charterer must pay such additional charter hire as may be due and any overpayment will be refunded to the charterer 'as may be required'."[*] 308 F. 2d at 871.

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[*] In a footnote to the quoted paragraph the Fourth Circuit said:

"The final audit to which Clause 6(b) of the charter refers, may well be one final audit of all operations under the charter made after its expiration. On the limitations questions, that was the position of the shipping companies in the cases reported sub nom. *American-Foreign Steamship Corporation* v. *United States*. And see Maritime's circular letter quoted by

The accounting which Black Diamond filed in August 1951 purported to be a "final accounting", subject to minor debits and credits for items which were paid or received thereafter. The audit of that "final account", which was made by the Maritime Commission in February 1952 was a final audit within the meaning of clause 13.

Since clause 13 referred to "*each* final audit" [emphasis supplied], it is clear that the possibility of more than one "final audit" was contemplated. While the term "final audit" was not defined in either the charters or the regulations, it seems clear that the term applies to a formal audit of a "final accounting". The latter term is defined in Supplement 21 to General Order 60.[4]

Despite the reference in clause 13 to "each final audit", Black Diamond argues that clause 13 contemplated only one final audit, and contends that the audit of the "revised accounting" which Black Diamond submitted on August 9, 1955, covering items

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Judge Hincks in footnote 4 of his opinion for the majority of the first en banc court, 265 F. 2d at 145."

The circular letter will be discussed below, in connection with the audit of the "final accounting" filed by Black Diamond in August 1951. It does not appear that the Fourth Circuit was attempting to rule on the question of limitations; particularly it was not ruling on the effect of clause 13 in the Black Diamond contract, particularly with reference to "each final audit".

[4] Sec. 299.37-2(b)(1) of Supplement 21 (15 Fed. Reg. 1790) required the charterers "to submit a separate final accounting of additional charter hire * * * for each annual or overall accounting period under SHIPSALES-DEMISE 303 and addenda thereto". Sec. 299.37-2(c)(1) required submission of a "revised accounting" covering charter operations subsequent to December 31, 1949, and any adjustments to prior accountings.

recorded on its books through June 30, 1955, was the "final audit" which started limitations running. But even that audit would not be "final" in the sense for which Black Diamond argues, because the evidence shows that additional items were recorded as late as March 1956, and it does not appear that they were the last. Such additional items call for further auditing, formal or informal. To hold that only a last, never-thereafter-subject-to-revision audit satisfies the "each final audit" language of clause 13, would frustrate the purpose of the statute of limitations.

In the course of the oral argument at the last hearing, Black Diamond's attorney admitted that the February 1952 audit would have been a final audit which started limitations running if it had not been for the agreement contained in the correspondence between Black Diamond and the Maritime Commission set out in paragraphs 8 through 12 and 14 of the Findings of Fact.

These letters indicate clearly that the parties agreed to keep the accountings open for new debits and credits resulting from items paid or received by Black Diamond after the date of the "final accounting" filed in August 1951, which was audited in February 1952, and for similar adjustments. But there is nothing in the letters which permits Black Diamond to raise for the first time, four or more years later, a claim based not upon any such debits and credits, or adjustments, but upon an entirely new theory, attacking the method of accounting prescribed by a regulation already promulgated in 1950 and followed without protest by Black Diamond in the preparation of its "final accounting" in 1951. The letters cannot and do not extend the time within which Black Diamond might file suit on such a claim.

The following paragraphs from the opinion in *American Eastern Corp.* v. *United States,* supra, apply directly or by analogy:

> "Libelant asserts that respondent's position was not unequivocal because of certain reservations in other provisions of the procedure for final accounting reserving the Commission's right to deviate from its formula for the calculation and allocation of capital and income where necessary to avoid an inequity. This does not establish that the regulations were in any sense tentative. This reservation was inherent in the complexity of the subject matter, the inability to prescribe a formula which would do justice in every case. It was not the deferment of the interpretation of the charter. Further, the matter affected by such reservations did not concern the basis for the present claim and, in any event, the reservations were of such a general nature that they could not diffuse the effect of the precisely expressed proscription against offsetting profits by subsequent losses.
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> * * * * * *
>
> "The labyrinthine aspects of the charter and regulations which libelant has seen fit to exaggerate are really only superficial. They are to be expected in any administrative attempt to deal with a complex subject matter on a mass scale. Care must be taken not to permit their seeming complexity to confuse the elementary simplicity of the dealings between the parties." 133 F. Supp. at 16.

In the instant case this Court concludes that the cause of action on the "cumulation claim" arose not later than 1952, when the "final accounting" which Black Diamond filed in August 1951 was audited by the Maritime Commission. Since this action was not filed until November 1956, it is barred by the two-year limitations provision in the suits in Admiralty Act.

World Market Charter Rates

The government claims that the Maritime Commission should not have allowed Black Diamond to pay a rate less than the "world market charter rate". It relies on the language of sec. 5(b) of the Ship Sales Act, 60 Stat. 41, 50 U.S.C. App. 1735,[1] to support this contention. Although the meaning of the language in the statute is not free from doubt, the four courts which have passed on the question have been unanimous in denying the government's claim. *Dichman, Wright & Pugh* v. *United States*, S.D.N.Y., 144 F. Supp. 922 (1956); *United States* v. *East Harbor Trading Corporation*, S.D.N.Y., 190 F. Supp. 245 (1960); *American Export Lines, Inc.* v. *United States*, Ct. Cl., 290 F. 2d 925 (1961); and *Massachusetts Trustees of Eastern Gas and Fuel Associates* v. *United States*, D. Mass., 202 F. Supp. 297 (1962). This Court agrees with the conclusion reached in those cases.

Counsel will prepare an order giving effect to the foregoing opinion.

/S/ ROSZEL C. THOMSEN,
Chief Judge, U.S. District Court.

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[1] Sec. 5(b) provides:

"The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 883

UNITED STATES OF AMERICA, *Petitioner,*

v.

BLACK DIAMOND STEAMSHIP CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions below are set forth in the Appendix to the Petition; the jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Where a charter contract called for payment of basic charter hire to the Government, plus preliminary payments of a share of "cumulative" profits, with subsequent adjustments to be made at the time of completion of preliminary statements or final audit, and where the facts as found by the court below showed that earlier accountings were not final and both parties

had so agreed, and where suit was begun within two years after a final accounting was struck, is the claim time-barred under the two-year limitation of the Suits in Admiralty Act?

2. Section 709(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1199(a) requires that charters of Government vessels include a provision for sharing of "cumulative net voyage profits". Does the "cumulative" provision prohibit a charterer from offsetting profits by losses in subsequent years or does it call for one cumulation—sharing—over the period of the charter as already held in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, certiorari denied by this Court three years ago, 372 U.S. 944?

COUNTER-STATEMENT

The facts are set forth in the opinion of the court below (Petition App. 1a-9a). The facts appear to be undisputed, and no restatement would be necessary, were it not for the following omissions from Petitioner's Statement:

1. The effect of the decision below does not appear in the Statement. Under the charter here, the Maritime Commission was entitled to two types of hire from Black Diamond: a) basic fixed charter hire plus b) a half-share of "cumulative net voyage profits" over 10 per centum per annum on capital employed.

Total cumulative profits were $667,908.72—but the Maritime Commission demanded and received $943,050.41 as "preliminary payments" of its "share." Since "preliminary payments" for the Government's "share" of profits were more than *total* profits, Black Diamond is left with a net loss of $275,141.69, without any allowance for a return on capital or otherwise. This fact the Court below recognized, holding that the

Government "has been unjustly enriched" (Pet. App. 15a). The amount Black Diamond claims in this suit—$247,315.67—will not even make it whole, and will still leave the Government with more than 100% of all profits (Pet. App. 8a-9a).[1]

2. Petitioner's Statement refers (Pet. p. 6), to a 1951 document "labeled a 'final accounting'" submitted by Black Diamond, after earlier mentioning "considerable correspondence" about this accounting (Pet. p. 5). The "considerable correspondence" is not described, but it should be. The correspondence reveals, as the opinion below shows in detail (Pet. App. pp. 4a-8a), that the parties agreed the 1951 accounts were not and could not be final; as Black Diamond advised the Commission: "it must be evident that these accountings cannot be 'final'" (letter of November 28, 1950, Pet. App. 5a).

3. Petitioner's Statement refers (Pet. p. 6, footnote 5) to additional items representing "roughly one per cent of the total cash transactions" recorded between the 1951 accounting and the 1955 accounting held to be the final accounting by the Court below. The amounts of the additional items, as found by the Court below, were "not inconsiderable": expenditures of $199,535 and receipts of $257,843 (Pet. App. p. 10a).

4. Petitioner's Statement asserts (Pet. p. 8, footnote 8) that "The accounting process has not yet ended; there are still items recorded on Black Diamond's books which have not been accounted for or audited." As a matter of fact if there are *any* items not audited, the fault is plainly the Government's. All items but one set

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[1] The reason Black Diamond cannot be made completely whole is that the charter was split into two accounting periods by the "Foreign Trade Addendum": *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 250-51.

involving a collision claim settlement were presented in the 1955 accounts. As a matter of fact the Government *has* audited the 1955 accountings (though refusing for tactical reasons to issue formal advice of audit). The Government has known of the only subsequent item—the collision claim settlement—throughout the litigation below.

5. The Court below found as a fact that the correspondence between the parties "conclusively" implied "that the account was not ripe to be squared off" in 1951 (Pet. App. p. 10a). The Court below found as a fact "that no final audit was attempted or practicable before 1955." (Pet. App. p. 9a).

6. The Court below found as a fact that the delays in settling accounts did not injure the United States which long has been in possession of the money (Pet. App. p. 15a).[2]

ARGUMENT

1. No aspect of this case calls for exercise of the certiorari jurisdiction.

The decision below is plainly right as a matter of individual justice; the effect of the decision is to allow Black Diamond to recover back a part of its payments—supposed to be *sharing* of profits—so that the Government does not retain too much more than 100% of profits as its "share" of profits. It is as if a taxpayer were seeking to pay 110% of its income as tax, not 150%. The Court below said, and it was plainly right, that to deny the claim would be to leave the Government unjustly enriched (Pet. App. p. 15a). No considerations of policy or equity call for altering a decision so as to produce an unjust result.

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[2] Interest (at 4 percent) would run on the claim only from date of suit: Suits in Admiralty Act, Sec. 5, 46 U.S.C. 745.

Much of the decision below is concerned with the individual facts, and the decision itself turns on critical findings of fact as to the meaning of the correspondence between the parties, the state of accounts, and so on. The decision below is of no general importance; it has value as a precedent only to future litigants—if any—who both (a) have contracts with similar provisions for "final audit" and (b) can show correspondence and journal entries proving when the parties agreed accounts were "ripe to be squared off" and when final audit was "attempted or practicable" (Pet. App. pp. 9a, 10a). In legal context, such a holding is of little future importance, and in practice, of little immediate significance. The Petition seeks to lend importance to this case in three ways: (A) by claiming that two or three million dollars worth of claims in other cases turn on the holding here (Pet., p. 11); (B) by asserting a direct conflict among the circuits (Pet., p. 8), and (C) by adding to the questions as to which certiorari is sought an issue not even discussed below—the issue settled in the 1962 case of *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, cert. denied 372 U.S. 944. None of these three lends much future significance to a decision on a state of facts not likely to recur.

A. This case could control the disposition of two or three million dollars worth of claims only (1) if that many "cumulation" claims still existed and (2) if the decision here were determinative in all other cases. As to (1), counsel for petitioner have kindly supplied us with a list of claims going to make up the figure cited on page 11 of the Petition. Upon checking each case with counsel for claimants, our calculation is that the maximum amount which could be affected is about $700,000. (See Appendix, p. 15). This is a respectable sum, but not so impressive as to command this

Court's instant attention. More significant, however, is the absence of logical basis for claim (2)—for it is not at all clear why this case necessarily disposes of *any* other case, much less of all pending "cumulation" cases. Unless the course of accounting and correspondence between other parties and the Maritime Commission were identical to Black Diamond's, there is nothing in this case to prevent the Government from successfully asserting a time-bar in any other case. The Court below was at pains to point out that its ruling was based on its view of the contract *plus* "the factual premises just recounted showing that no final audit was attempted or practicable before 1955". (Pet. App. p. 9a).

B. The claim of a direct conflict in the circuits requires a brief review of the "charter hire" litigation now drawing to a close.

Black Diamond's case is one of the last of the group of "charter hire" cases involving charters of the war-built fleet. Three major issues were involved in this group of cases: (1) was the Government correct in collecting up to 90% of profits by requiring a "sliding scale" provision in charters; (2) could the Government split the charter into two accounting periods; and (3) when Congress called for sharing of "cumulative" profits did it mean the Government shared in profits during profit years but not losses in loss years? All three questions have now been answered. This Court decided the first two in the affirmative in *Massachusetts Trustees* v. *United States*, 377 U.S. 235. The third question was decided in 1962 in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (4 Cir.); certiorari was immediately sought and denied: 372 U.S. 944. The *Moore-McCormack* construction of "cumulative" to mean cumulative for the period of a charter is now the established law, followed in this case and in the

ninth circuit: *American President Lines* v. *United States*, 338 F. 2d 962.

Prior to the cases settling the merits of the three charter hire issues, the Government attempted to obtain decisions holding various suits time-barred. The undesirable results of this course are exemplified in the Second Circuit litigation which culminated with *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, cert. denied 368 U.S. 895.[3] This decision is made up of three opinions by five judges, all dealing with the time-bar defense to both "sliding scale" and "cumulation" claims, but presumably without regard to the merits of any claim. Two judges (Circuit Judges Friendly and Moore) would not have held either sliding scale or cumulation claims time-barred. Two judges in the majority (Circuit Judges Clark and Waterman) would have held all claims time-barred. The crucial point here, though, is that Judges Clark and Waterman would have found the cumulation claims time-barred only because they believed "additional hire depends on the amount of cumulative profits *for*

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[3] The District Court in *American Eastern Corporation* v. *United States*, 133 F.Supp. 11 (D.C.N.Y., 1955) held that the statute of limitations begins to run on a cumulation claim when the charterer "return[s] the last of its ships to [the Government]" (133 F. Supp. at 14). There was no discussion in that case of the merits of the cumulation claim, and in any event (as the court below noted (Pet., p. 4a)) all accountings had been submitted more than two years before that libel was filed. *American Eastern* was affirmed *per curiam* (231 F.2d 664 (C.A. 2, 1956)) with a citation to *Sword Line* v. *United States*, 228 F.2d 344 (C.A. 2, 1955), a case which also held, but with reference to a sliding scale claim, that the statute of limitations begins to run when the charterer returns its last ship to the Government. Neither the *American Eastern* holding nor the *Sword Line* holding survives *American Foreign*, which distinguished "sliding scale" from "cumulation" claims with respect to the running of the statute of limitations (291 F.2d at 603) and picked, for both types of claims, times other than the return of the last ship to the government.

the year" (291 F. 2d at 611, emphasis in original). In other words, these two judges were reasoning as if the "cumulative" accounting required were cumulative only for a year, not the period of the contract—which is wrong, as *Moore-McCormack* teaches.

Thus, as long as *Moore-McCormack* is good law, there is nothing in the decision of four out of the five judges in *American-Foreign* which conflicts with the decision here. Judges Moore and Friendly would not have held the claims time-barred, Judges Clark and Waterman were proceeding on a different view of the merits of a cumulation claim. Only in the remarks of Circuit Judge Smith is there the language which Petitioner quotes to show a conflict. Judge Smith's view (291 F. 2d at 607-8) is that disputes can be postponed by contract until audit (as here) but, for unexplained reasons, that the statute of limitations runs from time of preliminary statement. This reads out of the contract, for reasons which are neither stated nor apparent, the Government's promise to return money due at time of final audit.

The Court below here was of course aware of *American-Foreign,* but said (Pet. App. 13a):

> "The distinguishing holding there was that liability for additional hire was to be determined on a yearly rather than a charter-term basis."

The Court below viewed the definition of "final audit" in this case as required by the *Moore-McCormack* precedent. Given *Moore-McCormack's* view of "cumulative accounting," *American-Foreign* is not in conflict with this case, at least as to four out of five judges. What the fifth judge (Judge Smith) would have held if he were following the *Moore-McCormack* view of the nature of the claim is difficult to say. In any event,

the "conflict" in the old limitations case of *American-Foreign* is neither important nor of any great present significance now that the nature and merits of the cumulation claim have been settled in *Moore-McCormack*.[4]

C. The petition (p. 16) asks this Court to reconsider its denial of certiorari in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (4th Cir., 1962), cert. denied 372 U.S. 944. The *Moore-McCormack* doctrine was not even challenged in the litigation, and was accepted by the Government in the Court below here. Moreover, the Petition admits there is a "continued lack of a conflict in court of appeals' decisions" (Pet. p. 16) as well as this Court's prior denial of certiorari. Nevertheless, in spite of the lack of conflict, the argument is that "it would be appropriate to review the merits of such claims in order finally to settle this ques-

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[4] Even before the *Moore-McCormack* decision, most of the judges in the Second Circuit thought the claims involved in *American-Foreign* were not time-barred. The *American-Foreign* litigation has a tangled history. Originally, Judges Medina, Hincks and Leibell held the claims time-barred on the authority of *Sword Line* v. *United States*, 228 F.2d 344 (C.A. 2, 1955), stating, however, that a different decision might have been made if the subject matter were *res nova*. 265 F.2d 136, 142 (C.A. 2, 1957). The case was then reargued *en banc*, in which Judges Hincks, Medina and Moore held that the time began to run at final audit, and Judges Clark and Waterman dissented (265 F.2d 148). This Court granted certiorari to consider only Judge Medina's eligibility to serve as a member of the *en banc* panel, and held that his retirement rendered him ineligible. 363 U.S. 685. The case was remanded and another *en banc* panel filed the split decision discussed above. Thus:

> "Of the total number of Judges of the Second Circuit who considered the time-bar issue, a majority have felt that Cause 13 is controlling and that the time-bar dismissal should have been reversed. These are Judges Hand, Hincks, Medina, Moore and Friendly." *American Mail Line, Ltd.* v. *United States*, 213 F.Supp. 152, 159-60 (D.C. Wash., 1962).

tion" (Pet., p. 16). Such a pallid argument could be made in support of a petition for certiorari in any case whatsoever.

In fact, it is apparent that review of *Moore-McCormack* is requested because the decision here necessarily follows from (1) *Moore-McCormack's* view of the nature of the claim and (2) the facts of this case. Since the facts of this case are hardly a suitable subject for this Court's review, the only possibility is to attack *Moore-McCormack*. We need not belabor the point that *Moore-McCormack* has become no better subject for review now that it is the settled law, followed without conflict, and now that the last charter hire cases are drawing to a close.

2. The Petition asserts that both the decision below and the decision in *Moore-McCormack* are wrong. They are not only right, but also good policy.

A. *As to Black Diamond.* The decision of the Court below is its own best defense. The opinion rests on a careful consideration of the facts, followed by (1) a holding that "no final audit was attempted or practicable until 1955" (Pet. App. p. 9a) and (2) an interpretation of Clause 13 of the charter as postponing multiple suits until final audit.

The interpretation of Clause 13 is right as a matter of the charter's language, right in view of the conduct of the parties (including the Government), and right as a matter of policy. The charter language promised refunds of overpayment after final audit. There is no reason why the Government should be allowed to escape this commitment when, as the Court below held "At no stage did the Commission intimate that the account was closed"

(Pet. App. p. 11a). Further, as a matter of policy, there is no reason why dealings between contractors and the Government should require a continuous spate of premature lawsuits, when the parties have agreed to have one final accounting. We agree that the Government could have made a different contract, calling for continuous lawsuits, but it did not.

B. As to *Moore-McCormack*. The decision in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (C.A. 4, 1962), cert. denied 372 U.S. 944, contains a painstaking review of the statutory language, the legislative history, and parallel enactments, leading the Court to conclude (308 F. 2d at 870):

> "Use of the word, 'cumulative' indicates an intention that profits and losses shall be cumulated over the life of the charter, just as profits and losses are cumulated over a fixed period of years for purposes of the closely related subsidy recapture."

In other words, Congress intended to take a share of profits over the charter period, not just take a share in good years while not offsetting bad years. The Petition here in two pages (pp. 17-18) offers a rather condensed attack on the *Moore-McCormack* holding. The Petition appears to admit that prior years' losses can offset later years' profits under a "cumulative" accounting, but not that later losses can offset earlier profits. This refined reading of the statute is called its "plain meaning", but represents somewhat of a reversal of the Government position before the Court of Appeals in the *Moore-McCormack* case itself, where the Government had denied that "cumula-

tive" accounting would take account of anything happening in a prior year.[5]

Whatever the Government position, it seems apparent that the plainest and most appropriate meaning of a statute calling for sharing "cumulative net voyage profits" is that there be some "cumulative net" profits during the contract. That is exactly what the *Moore-McCormack* court held.

The Government argues (Pet., pp. 17-18) that the proviso to § 709(a) supports its present interpretation. That proviso states "That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net *profit* in subsequent years." (Italics supplied). Plainly, as the court in *Moore-McCormack* held, the proviso was meant to prohibit carry-overs of profits from one year to the next, which would obligate the charterer to make successive payments on the same profit.[6]

Finally, the Government says (Pet., p. 18) that its interpretation is confirmed by long-standing administrative construction. There are three answers to this, each conclusive. First, the court in *Moore-McCormack* found precisely the opposite: until 1950, Maritime consistently allowed cumulation over the life of the charter.[7] Second, the 1941 General Counsel's opinion

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[5] See Petition for a Writ of Certiorari in No. 862 October Term 1962 (p. 12).

[6] "Its [the proviso's] obvious purpose was to assure that duplicating payments of additional charter hire should not be required on account of the same profit . . . The proviso . . . prohibit[s] only the use of the same reported profit in the calculation of additional charter hire in successive accountings." (308 F.2d at 873).

[7] "Maritime, thus, has consistently and formally interpreted the words 'cumulative net voyage profits' and used in § 709 to require an accumulation of the results of the charter operations over the period of the charter." (308 F.2d at 873).

referred to by the Government (Pet., p. 18) (a) considered *only* whether losses could be carried forward, and agreed that they could; and (b) determined that the proviso to § 709(a) was intended, as the court in *Moore-McCormack* found, to prevent successive payments on the same profits.[8] Third, the 1950 Regulation did not establish any long-standing administrative practices: it was challenged in numerous libels by the charterers[9] and has even been challenged by the Government.[10]

The Government's petition for certiorari in *Moore-McCormack* was denied. The present petition simply repeats a few pages of the earlier one.[11]

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

February 4, 1966

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[8] See Brief for Respondents in Opposition, No. 862, October Term, 1962, p. 10.

[9] See cases cited in *American-Foreign Steamship Corp.* v. *United States*, 265 F.2d 136, 143 (C.A. 2, 1958).

[10] The Government has instituted suits to recover charter hire on the theory that losses cannot be carried forward—the very proposition promulgated by the 1950 regulation. See Brief for Respondents in Opposition, No. 862, October Term, 1962, p. 12.

[11] Compare pages 17-18 of the Petition here with pages 7-9 of the Petition in No. 862, October Term, 1962.

APPENDIX

COMPARISON OF GOVERNMENT AND CLAIMANT ESTIMATES AMOUNTS INVOLVED IN PENDING CHARTER HIRE LITIGATION

	(1) Gov't Estimate Cumulation Claim	(2) Gov't Estimate "No Breakdown"	(3) Claimant Estimate Cumulation Claim	(4) Claimant Estimate Cumulation and Other Claims in Which Time-Bar Issue Involved
1. Amer. Export Lines (S.D.N.Y.) 62 Ad. 611 (S.D.N.Y.) A. 191-09	$ 116,000		$116,000	$ 28,000
2. Lykes Bros. S.S. Co. (E.D. La.) Adm. No. 2817	110,000		110,000	110,000
3. Marine Navigation Co. (D.Del.) Adm. No. 1747		$ 180,000	—0—	—0—
4. Mississippi Shipping Co. (E.D. La.) Adm. No. 2845	115,600		94,900	104,000
5. No. Atl. & Gulf S.S. Co. (S.D.N.Y.) Adm. No. 18437) (S.D.N.Y.) Adm. No. 183-255)	3,000		3,000	—0—
6. Pac.-Atl. S.S. Co. (D.Del.) Adm. No. 1722)			—0—[1]	45,646
(D.Del.) Adm. No. 1737		300,000	44,363[2]	44,363
7. Polaris S.S. Co. (S.D.N.Y.) 65, Ad. 687		113,000	26,000	109,000[3]
8. Pope & Talbot, Inc. (N.D. Cal.) Adm. No. 27161	874,000		10,400[4]	10,400
9. Prudential S.S. Corp. (S.D.N.Y.) Adm. No. 192-293	409,000		102,100[5]	102,100
10. Sea-Land Service, Inc. (D.Del.) Adm. No. 1816	33,220		33,220	33,220

	(1) Gov't Estimate Cumulation Claim	(2) Gov't Estimate "No Breakdown"	(3) Claimant Estimate Cumulation Claim	(4) Claimant Estimate Cumulation and Other Claims in Which Time-Bar Issue Involved
11. So. Atl. S.S. Line (D.Del.) Adm. No. 1735 (D.Del.) Adm. No. 1757		947,000	—0—[6]	—0—
12. States S.S. Co. (N.D. Cal.) Adm. No. 27101	92,000		97,000	97,000
13. Blidberg Rothchild Co. (D.Del.) Adm. No. 1758		11,000	—0—[7]	—0—
14. T.J. Stevenson & Co. (S.D.N.Y.) Adm. No. 198-141 (S.D.N.Y.) Adm. No. 184-383		109,000	5,000	5,000
15. Wessel, Duval & Co. (S.D.N.Y.) 60 Ad. 67		17,000	10,000	10,000
	$1,752,820	$1,677,000	$651,983	$698,729

Total Gov't Estimate (Columns 1 and 2): $3,429,820

[1] This libel involves $45,646 under a domestic trade addendum to the charter contract. There is a cumulation issue as to this addendum but it is a different cumulation question than the one involved in the Black Diamond or American Foreign charters.

[2] The cumulation claim involved in this libel is $44,363. There is also a $214,000 claim based on the theory that losses may be carried *forward* to offset *subsequent* profits—a proposition admitted by the Government here.

[3] This amount includes an $83,000 non-cumulation claim to which a time bar defense has been raised.

[4] The amount originally claimed in this libel is no longer recoverable because of this court's decision in Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235.

[5] There are two separate cumulation claims under two charters, one for $46,900 and a second for $55,200.

[6] This libel was dismissed following this Court's decision in Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235. An amount of $15,000 was refunded to the charterer; this amount was admittedly due but was withheld by the government pending the outcome of this litigation.

[7] No cumulation or time bar issues are involved in this claim.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 883

UNITED STATES OF AMERICA, PETITIONER

v.

BLACK DIAMOND STEAMSHIP CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Several matters in respondent's brief in opposition to the petition for a writ of certiorari require a short reply.

1. Respondent's suggestion (Br. in Opp. 5–6) that the decision below turns on the "individual facts" of this case is incorrect. The other pending cases in which charterers have raised "averaging" claims (referred to at p. 11 of the petition in this case and listed at pp. 14–15 of the brief in opposition) all involve the identical charter provision, the same ship-charter program under Section 5 of the Merchant Ship Sales Act of 1946, and the same 1950 Regulation of the Maritime Commission rejecting averaging claims un-

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der such charters. The decision below holds that these charterers may wait until two years after their accounts are finally "squared off" to bring suit. In none of the pending cases—and indeed, so far as we are aware, in none of the many charter hire cases already decided—were the accounts "squared off" more than two years before suit was brought. Thus, the rule adopted below would render *all* these suits timely, and no particularities of this case deprive the decision here of general importance.[1]

2. Respondent's suggestion that no conflict exists between the Second and Fourth Circuits on the time-bar issue is also incorrect.[2] Judge Smith's opinion for the court of appeals sitting *en banc* in *American Foreign Steamship Co.* v. *United States*, 291 F. 2d 598 (C.A. 2), is, as we show in the petition, squarely in conflict with the opinion below in this case. As re-

[1] Respondent's suggestion that the particular correspondence and journal entries in this case were critical to the result below (Br. in Opp. 5) is erroneous. In fact, the correspondence between the Maritime Commission and respondent here does not differ materially from the correspondence between the Commission and other charterers. See, *e.g.*, *American Eastern Corp.* v. *United States*, 133 F. Supp. 11, 14 (S.D.N.Y.), affirmed *per curiam*, 231 F. 2d 664 (C.A. 2), certiorari denied, 351 U.S. 983. As stated in the text, we are aware of no case in which the correspondence or entries showed the accounts to be "squared off" more than two years before suit.

[2] Respondent's insistence that the conflict between the circuits "is neither important nor of any great present significance now that the nature and merits of the cumulation claims have been settled in *Moore-McCormack*" (Br. in Opp. 9) is a *non-sequitur*. If the merits of the claim were "settled" as respondent asserts, then the time-bar question would become more, not less, crucial to the disposition of these cases.

spondent does not dispute, its claim would have been dismissed in the Second Circuit; nor does respondent dispute the fact that most, if not all, of the other pending averaging claims would be held time barred in the Second Circuit.[2]

Respondent urges that the concurrence of Judges Clark and Waterman, who with Judge Smith constituted the majority in *American-Foreign*, may be discounted because those judges joined the opinion of the court only because of their adverse view as to the merits of averaging claims like respondent's. At best, however, respondent's argument tends to show that not only has the Court of Appeals for the Second Circuit squarely disagreed with the decision below on the application of the statute of limitations to averaging claims, but that two judges of that court would also disagree as to the merits of the charterers' claims with the Fourth Circuit's decision in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, certiorari denied, 372 U.S. 944. Judges Clark and Waterman did not, as respondent asserts (Br. in Opp. 7), regard claims identical to respondent's as untimely "only" because they believed, contrary to the *Moore-McCormack* holding, that the additional hire owed was to be computed on a yearly basis, and not over the life of the charter. Rather, those judges also pointed out that the prolonging of the litigation of claims arising under these charters which results from the

[2] In a case decided after *Moore-McCormack*, the Second Circuit gave no indication that the *American-Foreign* rule was open to question in that court. Cf. *Luckenbach Steamship Co.* v. *United States*, 312 F. 2d 545 (C.A. 2).

charterers' position "would need to be clearly suggested by contract language and background before it could be accepted. But that quite clearly is not the case here; neither the language nor the inconclusive background brings this out" (291 F. 2d at 610). Additionally, they stressed that the previous disposition of the limitations issue in *American Eastern Corp* v. *United States*, 133 F. Supp. 11 (S.D.N.Y.), affirmed *per curiam*, 231 F. 2d 664 (C.A. 2), certiorari denied, 351 U.S. 983, was correct (265 F. 2d at 148, 149, 152–153). That decision clearly does not depend on the view that additional hire was to be calculated upon an annual basis.

In short, the opinion of Judges Clark and Waterman on the limitations question stands separate from their view of the merits of respondent's averaging claim; in addition, Judges Clark and Waterman disagree with the Fourth Circuit on the merits of the averaging claim—which is the second question presented in our petition.

3. Respondent also contends that this Court should not review the decision below because it is right "as a matter of individual justice" (Br. in Opp. 4). Aside from the fact that persons holding "just" claims against the Government must assert them within the statutory period, the alleged injustice of which respondent now belatedly complains[4] does not exist.

[4] Respondent refers (Br. in Opp. 4) to the statement by the court below (Pet. App. 15a) that the delay in bringing suit "even if inordinate, has not injured the United States for it has been possessed of the money ever since the funds were claimed to be due." Far from supporting the result below,

In this suit, as in the *Moore-McCormack* case, the charterer profited during early years of the charter and, of its own free will, chose to renew the charter. Now respondent seeks to force the Government to share its losses in those later years by permitting them to be set off against earlier profits in computation of charter hire for the earlier years. Not only is this procedure not justified by either the charter or the applicable statute; it also undercuts the principal Congressional policy in enacting the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1738)—which was to sell ships. Cf. *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 241–242. A rule permitting "averaging" of losses with earlier profits confers a benefit upon charterers even if their rental operations result in a loss, thus providing an incentive to continue to rent ships rather than to purchase them. Such a rule is plainly inconsistent with the legislative policy to promote sales.[5]

4. Finally, respondent takes issue with our statement (Pet. 11) that the time-bar issue is presented in approximately 20 cases brought by 15 charterers in district courts in four circuits which involve roughly

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this statement confirms that insufficient consideration was given below to the most elementary purpose of statutes of limitations—the prevention of stale claims, which are difficult to defend, and which deny the defendant certainty regarding his liabilities within a reasonable time.

[5] The merits of respondent's claim were not discussed below, as respondent correctly states, because (a) the district court held that the claim had not been timely asserted and (b) the Fourth Circuit already had decided the merits in *Moore-McCormack*.

2 to 3 million dollars exclusive of interest. According to respondent's estimates, there are 15 such cases brought by 12 charterers involving about $700,000 exclusive of interest. While we believe that our estimate is accurate,* even under respondent's estimate the present case plus the pending cases involve almost 1 million dollars in more than a dozen separate law suits in four circuits. Moreover, interest, if allowable, would add approximately 60 per cent to these claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

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*Respondent is correct with regard to one case; the libels in *So. Atl. S.S. Line* v. *United States*, which we listed as pending, have been dismissed.

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